DOCKET NO: LLI CV-20-6025167-S	:	SUPERIOR COURT
NOAH GREENBERG	:	J.D. OF LITCHFIELD
V.	:	AT TORRINGTON
THE GUNNERY, INC.	:	FEBRUARY 8, 2022

MEMORANDUM OF DECISION RE: MOTION FOR SUMMARY JUDGMENT # 177;

I

INTRODUCTION

The defendant, The Gunnery, Inc. moves for summary judgment on counts one, three, five, and seven of the plaintiff's complaint. Specifically, the defendant contends that there are no genuine issues of material fact in dispute that: (1) the plaintiff's contract and tort claims are barred by the educational deference doctrine and the plaintiff lacks standing to bring a contract claim; (2) the plaintiff's claim of breach of the implied covenant of good faith and fair dealing cannot stand because the plaintiff has not shown that the defendant acted in bad faith; (3) the plaintiff's negligence count cannot stand because the defendant did not owe a duty to the plaintiff or breach its alleged duty; and (4) as to the plaintiff's claim of reckless or wanton misconduct, there is nothing to show that the defendant acted willfully, wantonly, or recklessly. For all of the following reasons, the court denies the defendant's motion.

II

FACTS & PROCEDURAL HISTORY

The following facts alleged in the plaintiff's complaint are relevant to the defendant's motion for summary judgment. The plaintiff, Noah Greenberg was a boarding student at the

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defendant school from 2017–2019. The defendant the Gunnery,[1] is an elite coeducational boarding and day school located in Washington, Connecticut.

The defendant had notice of the plaintiff's learning disabilities when he entered the institution and requested that the plaintiff repeat his sophomore year and attend weekly tutoring at its Center for Academic Support. The defendant accommodated the plaintiff and, accordingly, the plaintiff flourished academically during his time at the defendant school. The plaintiff was selected to be a captain of the varsity football team and during the fall of 2019, the plaintiff's grades were the best that they had ever been.

Nevertheless, during his time at the defendant, the plaintiff accumulated several disciplinary infractions. The defendant's disciplinary model operates on a "two strike" system and a points-based system in which points are assigned for various disciplinary infractions. This system provides for: a "status warning" after the accumulation of 12 points, a "discipline warning" after the accumulation of 18 points, "probation" after the accumulation of 24 points, and a meeting with the Dean of Students and Head of School and a potential disciplinary committee hearing after the accumulation of 32 points. There are some exceptions to this points-based system and in some cases, students are placed on automatic probation for specific disciplinary infractions.

During his time at the defendant, the plaintiff was disciplined for: a 2018 incident involving an electrical short in one of the dormitories; an incident in which the plaintiff violated the defendant's academic dishonesty policy; minor infractions such as tardiness, failing to sign in or

[1] The Gunnery is now known as the Frederick Gunn School. Nevertheless, as The Gunnery is the only remaining defendant in this matter, the court will simply refer to it as "the defendant" throughout this decision.

out of campus, dress code violations, and failure to clean his room; and an altercation with Coach Gritti at one of the defendant's football games.

The plaintiff was expelled from the defendant on November 13, 2019, following a disciplinary committee meeting. The disciplinary committee cited the plaintiff's use of inappropriate language with Coach Gritti in its recommendation to the head of school to expel him. The plaintiff alleges that the defendant breached its contracts with the plaintiff, breached the implied covenant of good faith and fair dealing, was negligent, and committed reckless or wanton misconduct by dismissing the plaintiff in this manner.

On October 1, 2021, the defendant moved for summary judgment on counts one, three, five, and seven of the plaintiff's complaint. The plaintiff filed a memorandum in opposition to the defendant's motion on December 3, 2021, and the defendant filed its reply on December 15, 2021. The court heard argument, by remote means, on the defendant's motion on January 24, 2022.

III

DISCUSSION

"Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) *Graham* v. *Commissioner of Transportation*, 330 Conn. 400, 414–15, 195 A.3d 664 (2018).

A party seeking summary judgment has the very heavy burden of demonstrating the absence of any genuine issue of material fact which, under applicable principles of law, entitle

him to a judgment as a matter of law. *Appleton* v. *Board of Education*, 254 Conn. 205, 209, 757 A.2d 1059 (2000). "[T]he party moving for summary judgment . . . is required to support its motion with supporting documentation, including affidavits." (Internal quotation marks omitted.) *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 324 n.12, 77 A.3d 726 (2013). Conversely, "the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact." (Internal quotation marks omitted.) *Appleton* v. *Board of Education*, supra, 254 Conn. 209. This evidentiary foundation "must be demonstrated by counter-affidavits and concrete evidence." (Internal quotation marks omitted.) *Pion* v. *Southern New England Telephone*, 44 Conn. App. 657, 663, 691 A.2d 1107 (1997).

A party's conclusory statements may not be sufficient to establish the existence of a disputed issue of material fact, even if in affidavit form. *Gupta* v. *New Britain General Hospital*, 239 Conn. 574, 583, 687 A.2d 111 (1996). "[S]ummary judgment is appropriate only if a fair and reasonable person could conclude only one way. . . . [A] summary disposition . . . should be on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party." (Citations omitted; internal quotation marks omitted.) *Dugan* v. *Mobile Medical Testing Services, Inc.*, 265 Conn. 791, 815, 830 A.2d 752 (2003).

"[T]he genuine issue aspect of summary judgment requires the parties to bring forward before trial evidentiary facts, or substantial evidence outside the pleadings, from which the material facts alleged in the pleadings can warrantably be inferred. . . . A material fact has been defined adequately and simply as a fact which will make a difference in the result of the case." (Citation omitted; internal quotation marks omitted.) *Buell Industries, Inc.* v. *Greater New York Mutual Ins. Co.*, 259 Conn. 527, 556, 791 A.2d 489 (2002). "A genuine issue has been variously

described as a triable, substantial or real issue of fact . . . and has been defined as one which can be maintained by substantial evidence." (Citation omitted; internal quotation marks omitted.) *United Oil Co.* v. *Urban Redevelopment Commission*, 158 Conn. 364, 378, 260 A.2d 596 (1969); *Ardaji* v. *Columbia Pictures Industries, Inc.*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-19-6040356-S (November 20, 2020, *Genuario, J.*).

The defendant argues that there are no issues of material fact in dispute and that judgment should enter on its behalf as a matter of law. Specifically, the defendant contends that: the plaintiff's claims cannot withstand scrutiny under the educational deference doctrine; the plaintiff's contract claim fails because the plaintiff cannot establish a specific contractual promise or that the defendant acted arbitrarily and capriciously; the plaintiff lacks standing to allege breach of contract; the plaintiff has not shown any acts of the defendant that were taken in bad faith; there are no issues of fact as to duty and breach; and the plaintiff relied upon the same allegations for his negligence claim and his reckless or wanton misconduct claim. The plaintiff argues, in opposition, that there are material facts in dispute as to each of the plaintiff's claims and, therefore, summary judgment is improper. The court addresses each of these arguments in turn.

A. Breach of Contract

The defendant first argues that the educational deference doctrine, articulated by our Supreme Court in *Gupta* v. *New Britain General Hospital*, supra, 239 Conn. 574, precludes a finding for the plaintiff on his contract claim and that there are no genuine issues of material fact in dispute showing that the plaintiff would not prevail on this claim. Specifically, the defendant argues that the defendant's actions regarding the plaintiff were an honest exercise of discretion. Further, the defendant contends that the plaintiff lacks standing to bring his contract claim

because he has not entered into a contract with the defendant and has not pled that he is a beneficiary of his parents' contract and there is no evidence of any breach by the defendant.

Conversely, the plaintiff argues that there are issues of material fact in dispute as to whether the defendant breached its contract with the plaintiff. Indeed, the plaintiff argues that he is a contracting party with the defendant and, even if the court finds that he is not, he is a third-party beneficiary of his parents' enrollment contract with the defendant. The plaintiff additionally argues that the defendant is not entitled to educational deference because the plaintiff's contract claims are rooted in disciplinary and not academic matters.

1. Educational Deference

In *Gupta* v. *New Britain General Hospital*, supra, 239 Conn. 574, our Connecticut Supreme Court first articulated what has become known as the educational deference doctrine. In *Gupta*, the court stated that "[w]here the essence of the complaint is that [an educational institution] breached its agreement by failing to provide an effective education, the court is . . . asked to evaluate the course of instruction [and] called upon to review the soundness of the method of teaching that has been adopted by [that] educational institution. . . . This is a project that the judiciary is ill equipped to undertake." (Citation omitted; internal quotation marks omitted.) Id., 590. Indeed, "contract claims challenging the *overall quality* of educational programs have generally been rejected." (Emphasis added; internal quotation marks omitted.) Id., 592.

"There are, however, at least two situations wherein courts will entertain a cause of action for institutional breach of a contract for educational services. The first would be exemplified by a showing that the educational program failed in some fundamental respect, as by not offering any of the courses necessary to obtain certification in a particular field. . . . The second would arise if

the educational institution failed to fulfil a specific contractual promise distinct from any overall obligation to offer a reasonable program." (Citations omitted.) Id., 592–93. Here, the plaintiff's contract claim falls within the second situation.

In the present action, the defendant relies upon *Gupta* and argues that educational deference precludes the plaintiff from recovery in this matter on both his contract and tort claims. Nevertheless, the plaintiff's reliance on *Gupta* is misplaced. In *McCarty* v. *Yale University*, Superior Court, judicial district of New Haven, Docket No. CV-16-6063796-S (August 29, 2017) (65 Conn. L. Rptr. 156), the Superior Court, *Wilson, J.*, found that in arguing educational deference, Yale ignored that the plaintiff's dismissal was based on *disciplinary reasons, not academic reasons*. Judge Wilson noted that disciplinary dismissals fall squarely within an exception to educational deference. Id. The Superior Court, *Wilson, J.*, stated that whether a disciplinary dismissal complied with due process fell squarely within the court's competence. Id. This is because "[any] court hearing this complaint and its allegations will not have to involve itself in intricate theories of education or methods of academic training." (Internal quotation marks omitted.) *Coppola* v. *St. Bernadette's Catholic School,* Superior Court, judicial district of New Haven, Docket No. CV-18-6080356-S (June 6, 2019, *Pierson, J.*) (68 Conn. L. Rptr. 677). Accordingly, as the plaintiff's dismissal in the present action is based on disciplinary rather than academic reasons, the educational deference doctrine is not dispositive of the plaintiff's contract and tort claims.

2. Standing and Breach

"[C]ourts will entertain a cause of action for institutional breach of a contract for institutional services . . . if the educational institution failed to fulfill a specific contractual promise distinct from any overall obligation to offer a reasonable program." (Internal quotation

marks omitted.) *Haughwout* v. *Tordenti*, Superior Court, judicial district of New Britain, Docket No. CV-16-6032526 (November 17, 2016, *Shortall, J.T.R.*), aff'd, 332 Conn. 559, 211 A.3d 1 (2019).

"It is well established that [a] contract is to be construed according to what may be assumed to have been the understanding of the parties. . . . The intention of the parties is a question of fact to be determined from the language of the contract, the circumstances attending its negotiation, and the conduct of the parties in relation thereto." (Internal quotation marks omitted.) *JP Morgan Chase Bank, National Assn.* v. *Virgulak*, --- Conn. ---, --- A.3d --- (2022).

In the present action, the plaintiff argues that he was a third party beneficiary of a contract between his parents and the defendant. It is established law that "[a] third party beneficiary may enforce a contractual obligation without being in privity with the actual parties to the contract. . . . Therefore, a third party beneficiary who is not a named obligee in a given contract may sue the obligor for breach." (Citation omitted; footnote omitted.) *Gateway Co.* v. *DiNoia,* 232 Conn. 223, 230–31, 654 A.2d 342 (1995).

"[T]he ultimate test to be applied [in determining whether a person has a right of action as a third party beneficiary] is whether the intent of the parties to the contract was that the promisor should assume a direct obligation to the third party [beneficiary] . . . ." (Internal quotation marks omitted.) *Knapp* v. *New Haven Road Construction Co.,* 150 Conn. 321, 325, 189 A.2d 386 (1963). "In *Stowe* v. *Smith,* 184 Conn. 194, 196, 441 A.2d 81 (1981), our Supreme Court stated that a third party seeking to enforce a contract *must allege* and prove *that the contracting parties intended that the promisor should assume a direct obligation to the third party*." (Emphasis in original; internal quotation marks omitted.). *Grand Prix Motors, Inc.* v.

McVay, Superior Court, judicial district of Danbury, Docket No. CV-21-6038369-S (November 30, 2021, *Kowalski, J.*).

"In *Knapp* v. *New Haven Road Construction Co.*, [supra, 150 Conn. 325], [the Supreme Court] quoted *Colonial Discount Co.* v. *Avon Motors, Inc.*, 137 Conn. 196, 201, 75 A.2d 507 (1950), and reaffirmed that [t]he ultimate test to be applied [in determining whether a person has a right of action as a *third party beneficiary*] is whether the intent of the parties to the contract was that the promisor should assume a direct obligation to the *third party [beneficiary]* and . . . that intent is to be determined from the terms of the contract read in the light of the circumstances attending its making, including the motives and purposes of the parties. . . . Although [the court] explained that it is not in all instances necessary that there be express language in the contract creating a direct obligation to the claimed *third party beneficiary* . . . [the court] emphasized that the only way a contract could create a direct obligation between a promisor and a *third party beneficiary* would have to be . . . because the parties to the contract so intended." (Citation omitted; emphasis added; internal quotation marks omitted.) *Dow & Condon, Inc.* v. *Brookfield Development Corp.*, 266 Conn. 572, 580–81, 833 A.2d 908 (2003).

Here, the court finds that at a minimum there is a genuine issue of material fact in dispute as to whether the plaintiff was a third party beneficiary of the contract between his parents and the defendant. The plaintiff alleges that the defendant promised to treat him with respect and dignity and to not tolerate harassment or discrimination against him on the basis of a present or past learning disability. See Def. Ex. B-1 The plaintiff argues that the defendant breached its contract by allowing Coach Gritti to abuse and/or treat the plaintiff in a derogatory fashion by calling him stupid.

In *Doe* v. *Quinnipiac University*, 404 F. Supp. 3d 643, 671 (D. Conn. 2019), Judge Arterton quoted the Connecticut Superior Court, *Fisher, J.*, stating "there was some sort of contractual agreement between QU [Quinnipiac University] and the plaintiff for QU to provide an education to the plaintiff and for the plaintiff to pay some amount of tuition to QU for that education. . . . Therefore, the contours of that contract were informed to some degree by the Student Handbook and the Student Code of Conduct. Indeed, QU's reliance upon the Student Handbook and the Student Code of Conduct as justification for its suspension of the plaintiff is ample evidence of that. Accordingly, QU cannot now deny the plaintiff's claims based upon the same sections of the Student Handbook. This court concludes a trier of fact could find that there was an implied contract between the plaintiff and QU and that the Student Handbook and the Student Code of Conduct were a part of that contract." (Citation omitted; internal quotation marks omitted.) *Demoulas* v. *Quinnipiac University*, Superior Court, judicial district of New Haven, Docket No. CV-15-5006283-S (March 5, 2015).

Further, in *Jacobs* v. *Ethel Walker School Inc.,* Superior Court, judicial district of New Britain, Docket No. CV-02-0515279-S (September 30, 2003, *Robinson, J.*), the court denied the defendant school's motion for summary judgment finding that based on the affidavits, transcript excerpts, and other materials submitted there was a genuine issue of material fact as to whether the defendants conducted the disciplinary proceedings against the student in a manner that was arbitrary and capricious and whether actions were taken in bad faith, constituting a breach of the educational contract between the parties.

The plaintiff in the present action alleges that the defendant promised wrap around services knowing of his anxiety, learning disability, and feelings of inadequacy. See Pl. Obj. Exs. AH, BN. The plaintiff also alleges that the defendant charged his parents $20,000 extra for

disability services. The plaintiff alleges further that the defendant promised that it would not tolerate harassment against a student based upon learning disability and that the defendant had a social honor code, and it pledged that its athletes and coaches abide by the code of conduct of New England Preparatory Schools. See Def. Ex. B-1; Pl. Obj. Ex. AR. Specifically, the Student Handbook provides that the defendant "does not tolerate harassment or discrimination against any student . . . on the basis of their . . . learning disability . . . ." Def. Ex. B-1. The defendant's employee, Coach Gritti admitted that cursing at players and calling a student stupid would not conform to the code. Pl. Obj. Ex. AE. The defendant's Student Handbook sets forth that the defendant would handle each disciplinary matter consistently and objectively. Def. Ex. B-1

The plaintiff alleges that ultimately what led to his referral to the defendant's disciplinary committee, which recommended expulsion, was the plaintiff's act in swearing at Coach Gritti. Coach Gritti denies using offensive language with the plaintiff and other students and denies calling the plaintiff "stupid." See Pl. Obj. Ex. P; Pl. Obj. Ex. AE. The plaintiff has presented affidavits and other documentation showing there is a genuine issue of material fact as to whether Coach Gritti used offensive language with the plaintiff and other students. See, e.g., Pl. Obj. Exs. Y, AW, AV. Having reviewed the briefs, the affidavits, and all the materials submitted, this court concludes that there are genuine issues of material fact in dispute as to whether the defendant breached its contract with the plaintiff. Therefore, the defendant's motion for summary judgment as to count one must be denied.

B. Breach of the Covenant of Good Faith and Fair Dealing

The defendant next argues that summary judgment should enter on the plaintiff's third count because even if the plaintiff can show that a contract existed, there are no facts to show breach or that the defendant acted in bad faith, as required for the claim. The plaintiff, on the

other hand, contends that the defendant is liable for breaching the implied covenant of good faith and fair dealing and the defendant acted arbitrarily and capriciously in dismissing the plaintiff.

"Every contract carries an implied covenant of good faith and fair dealing requiring that neither party do anything that will injure the right of the other to receive the benefits of the agreement." *Habetz* v. *Condon*, 224 Conn. 231, 238, 618 A.2d 501 (1992). "To constitute a breach of [the implied covenant of good faith and fair dealing], the acts by which a defendant allegedly impedes the plaintiff's right to receive benefits that he or she reasonably expected to receive under the contract must have been taken in bad faith. . . . Bad faith in general implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive." (Citation omitted; internal quotation marks omitted.) *Keller* v. *Beckenstein,* 117 Conn. App. 550, 563–64, 979 A.2d 1055, cert. denied, 294 Conn. 913, 983 A.2d 274 (2009).

The concept of good faith and fair dealing is "[e]ssentially . . . a rule of construction designed to fulfill the reasonable expectations of the contracting parties as they presumably intended." (Internal quotation marks omitted.) *Verrastro* v. *Middlesex Ins. Co.*, 207 Conn. 179, 190, 540 A.2d 693 (1988). "Whether a party has acted in bad faith is a question of fact, subject to the clearly erroneous standard of review." *Harley* v. *Indian Spring Land Co.,* 123 Conn. App. 800, 837, 3 A.3d 992 (2010).

An action for breach of the implied covenant of good faith and fair dealing requires proof of three essential elements: "(1) that the plaintiff and the defendant were parties to a contract under which the plaintiff reasonably expected to receive certain benefits; (2) that the defendant engaged in conduct that injured the plaintiff's right to receive some or all of those benefits; and

(3) that when committing the acts by which it injured the plaintiff's right to receive benefits it reasonably expected to receive under the contract, the defendant was acting in bad faith." (Internal quotation marks omitted.) *Le* v. *Saporoso*, Superior Court, judicial district of Hartford, Docket No. CV-09-5028391-S (October 19, 2009, *Domnarski, J.*). "Bad faith means more than mere negligence; it involves a dishonest purpose." *Habetz* v. *Condon*, supra, 224 Conn. 237.

In the present action, at a minimum there are genuine issues of material fact in dispute as to whether the plaintiff was a third party beneficiary of a contract between his parents and the defendant and whether dismissing the plaintiff for the foul language directed at Coach Gritti was done in bad faith in light of Coach Gritti calling the plaintiff "stupid" and using similar foul language when referencing students. See Pl. Obj. Exs. M, N, Y, AW, AV. Finally, there is a genuine issue of material fact in dispute as to whether the defendant injured the plaintiff's right to receive an education from the defendant. See Def. Ex. B-1; Pl. Obj. Ex. AR.

As discussed above, the court finds that there are genuine issues of material fact in dispute as to whether the defendant properly expelled the plaintiff in accordance with the provisions of the student handbook. See Def. B-1. The same holds true for the defendant's argument concerning the plaintiff's claim for breach of the implied covenant of good faith and fair dealing. Accordingly, summary judgment is denied with regard to count two.

C. Negligence

The plaintiff alleges the defendant breached its duty to him by allowing Coach Gritti to berate, harass and demean the plaintiff by calling him a "bitch," "wus," "dumb," and "stupid" despite knowing that he suffered from learning disabilities. The defendant moves for summary

judgment on this count arguing that there is no evidence to establish duty or breach on the part of the defendant arising from Coach Gritti's conduct and there are no facts to suggest that the defendant breached its duty of care to the plaintiff concerning its disciplinary process. The plaintiff argues, in turn, that the defendant owed a duty of care to the plaintiff in loco parentis to protect him from harm and owed a duty not to discriminate against him on the basis of his disabilities. Nevertheless, the plaintiff contends that the defendant breached that duty by exposing him to the abuse of Coach Gritti.

1. Educational Deference

In *Doe* v. *Yale University*, 252 Conn. 641, 659, 748 A.2d 834 (2000) the Connecticut Supreme Court noted that its holding in *Gupta* did not preclude every negligence claim that arose within an institutional setting. "If the duty alleged to have been breached is the duty to educate effectively, the claim is not cognizable. . . . If the duty alleged to have been breached is the common-law duty not to cause physical injury by negligent conduct, such a claim is, of course, cognizable." (Citation omitted.) Id.

In *Johnson* v. *Schmitz*, 119 F. Supp. 2d 90, 99 (D. Conn. 2000), the United States District Court for the district of Connecticut discussed *Doe*, stating "the Connecticut Supreme court rejected the proposition that the common law duty of care disappear[s] when the negligent conduct occurs in an educational setting." (Internal quotation marks omitted.). In *Johnson*, the court noted that the plaintiff's claim was not based upon an alleged duty to educate. Id. Rather, the plaintiff's claims were that the defendant violated a duty to establish and enforce reasonable rules. Id. "[T]his is a sphere which the judicial system is capable of assessing." Id. Like the defendant in the present action, in *Johnson*, the defendant argued that that the only negligence claim recognized in an educational setting was the duty to not cause physical harm by negligent

conduct. Id. The District Court rejected this argument stating that under Connecticut Supreme Court precedent, "[i]f the duty alleged to have been breached is the duty to educate effectively, the claim is not cognizable. . . . Because the duty alleged to be breached is the duty to *establish and enforce reasonable rules*, this Court is not precluded by *Doe* from hearing the claim." (Citation omitted; emphasis added; internal quotation marks omitted.) Id. Accordingly, as previously noted, the educational deference doctrine does not foreclose the plaintiff's negligence claim.

2. Duty and Breach

In the present action, the plaintiff alleges that the defendant was negligent for failing to protect the plaintiff from Coach Gritti and in expelling the plaintiff. "[T]he essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury . . . and [t]he existence of a duty of care is a prerequisite to a finding of negligence . . . ." (Citation omitted; internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 538, 51 A.3d 367 (2012). In Connecticut, generally, there is no duty that obligates one party to aid or to protect against the torts of another party, except under certain circumstances. "In delineating more precisely the parameters of this limited exception to the general rule . . . [in the absence of] a special relationship of custody or control, there is no duty to protect a third party . . . ." (Emphasis omitted; internal quotation marks omitted.) *Roe #1* v. *Boy Scouts of America Corp.*, 147 Conn. App. 622, 642, 84 A.3d 443 (2014); see also 2 Restatement (Second), Torts, Duties of Affirmative Action §§ 314, 314A, 315 (1965).

In assessing the duty owed toward others for the tortuous acts of third parties, "[t]he text of § 315 (a) of the Restatement (Second) does not define the special relationships that give rise to a duty to control the conduct of a third party. The comments to § 315 (a), however, are

particularly enlightening in this regard because they reference corresponding Restatement (Second) sections that delineate precisely those relationships that fall within the purview of § 315 (a). . . . The relations between the actor and a third person which require the actor to control the third person's conduct are stated in §§ 316–319.

"Sections 316, 318 and 319 of the Restatement (Second) all identify specific relationships that give rise to a duty to control a third party pursuant to § 315 (a). Section 316 imposes a duty on a parent to prevent his minor child from intentionally harming a third party. Section 318 imposes a duty on the possessor of land or chattels to control the conduct of a licensee. Finally, § 319 requires those exercising custodial control over an individual, such as sheriffs or wardens, to prevent such an individual from harming third parties." (Citation omitted; internal quotation marks omitted.) *Cannizzaro* v. *Marinyak*, 312 Conn. 361, 367 n.2, 93 A.3d 584 (2014); see *Murdock* v. *Croughwell*, 268 Conn. 559, 567–68, 848 A.2d 363 (2004) ("[t]here is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless . . . a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct" [internal quotation marks omitted]).

"Section 320 of the Restatement (Second) imposes a duty of care upon a person who takes custody of another person so as to deprive him of his normal powers of self-protection. As the comments to § 320 make clear, this rule is applicable to sheriffs, jailers, officials charged with the care of mentally impaired individuals, *private schools* and hospitals and public schools." (Footnote omitted; emphasis added.) *Murdock* v. *Croughwell*, supra, 268 Conn. 570–71. "[T]he defendants stood in the shoes of the parents of the children . . . and thus, had a duty to protect them from the intentional acts of others . . . ." *Milhomme* v. *Levola*, Superior Court, judicial

district of Windham, Docket No. CV-94-0048326-S (July 14, 1995, *Foley, J.*) (14 Conn. L. Rptr. 517).

"Every public school shares this common-sense duty to protect the health and safety of students in its care, Connecticut General Statutes § 10-220, but this duty may be heightened for boarding schools, institutions that accept responsibility for students' well being. *Vernonia School Dist. 47J* v. *Acton,* 515 U.S. 646, 654–55, 115 S. Ct. 2386, 132 L.Ed.2d 564 (1995); cf. *Loomis Inst.* v. *Windsor,* 234 Conn. 169, 172, 661 A.2d 1001 (1995) (reasoning that on-campus faculty members, unlike off campus faculty members, act in loco parentis to boarding students and must be available on a twenty-four hour basis to take care of any problems that may occur at the school); accord *Andreozzi* v. *Rubano,* 145 Conn. 280, 282, 141 A.2d 639 (1958) (holding that teachers stand in loco parentis toward a pupil in matters of discipline and security)." (Citation omitted; internal quotation marks omitted.) *Munn* v. *Hotchkiss School,* 24 F. Supp. 3d 155, 170 (D. Conn. 2014), aff'd, 724 F. Appx. 25 (2d Cir. 2018). "[T]his duty arises not only in the public school settings, but in private and other settings." (Internal quotation marks omitted.) *Granja* v. *Middlebury Congregational Church*, Superior Court, judicial district of Waterbury, Docket No. CV-12-6012892-S (October 31, 2012, *Shapiro, J.*) (54 Conn. L. Rptr. 917).

Importantly, "[a] teacher stands in loco parentis toward a pupil." *Andreozzi* v. *Rubano*, 145 Conn. 280, 282, 141 A.2d 639 (1958). In loco parentis "is defined as [a]cting as a temporary guardian of a child." (Citation omitted; internal quotation marks omitted.) *Trinkaus* v. *Mohawk Mountain Ski Area*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-02-0078510-S (June 6, 2003, *Lager, J.*) (35 Conn. L. Rptr. 121).

The defendant argues that it had no in loco parentis obligation to the plaintiff. Nevertheless, in his deposition, Head of School Peter Becker affirmatively acknowledged that

the defendant faculty, dorm parents, and employees stand in loco parentis for the students. See Pl. Obj. Ex. T, Deposition of Peter Becker, p. 37. When asked what "in loco parentis" meant in the context of the defendant institution Becker stated that "parents can trust their students to us, their kids to us, and so while we're not the child's parent, we recognize the responsibility to care for them." Id.

Here, the plaintiff claims that the defendant violated its duty by discriminating against the plaintiff, by not providing counseling to the plaintiff and not protecting the plaintiff from Coach Gritti. Another coach from the football team testified that Coach Gritti would use profanity on the football field. Pl. Obj. Ex. I, Deposition of LaDarius Drew, p. 106. Coach Drew admitted that Coach Gritti told the football team, "you're acting like a bunch of p*ssies." Id., 229–231, 233. Coach Drew also stated that on another occasion, when the plaintiff had a false start three different times on a play, Coach Gritti stated, "Noah, are you stupid?" Id., 230. At least one faculty member stated "Steve Gritti is a provocateur and it's just too bad that Noah [Greenberg] took the bait." Pl. Obj. Ex. S. Further, Coach Drew admitted to using curse words on the football field such as the f word, the s word, and damn. Pl. Obj. Ex. I, supra, p. 143.

The plaintiff was placed on probation on November 12, 2019, after allegedly screaming at Coach Gritti saying he was a "fat p*ssy, failure, loser and bald." A disciplinary committee was then scheduled for November 13. The disciplinary committee recommended that the plaintiff be dismissed from the defendant school. Pl. Obj. Ex. AW. The defendant's headmaster met with the plaintiff and expelled the plaintiff from the defendant. Prior to expelling the plaintiff, the defendant was aware of the plaintiff's claim that Coach Gritti had used profanity when referring to students and the claim that he had called the plaintiff "stupid." See Pl. Obj. Ex. X, AW, AV.

A genuine issue of material fact exists as to whether the defendant breached its duty of care to the plaintiff in expelling the plaintiff based, at least in part, on the plaintiff's use of profanity. This is because there is some evidence that Coach Gritti himself had used profanity with students and had referred to the plaintiff as being "stupid." A trier of fact could decide that the defendant violated its duty of care in expelling the plaintiff based, at least in part, on the plaintiff's use of derogatory terms towards Coach Gritti when Coach Gritti had himself used profanity at students, including the plaintiff.

D. Wanton and Reckless Misconduct

Last, the defendant contends that there are no genuine issues of fact in dispute as to the plaintiff's recklessness claim and the plaintiff cannot show that the defendant acted with the requisite intent for a recklessness claim to stand. The plaintiff argues that the defendant's cover up of Coach Gritti's wrongdoing demonstrates reckless and wanton misconduct because the defendant knowingly and intentionally failed to consider Coach Gritti's treatment of the plaintiff in his expulsion proceedings.

"Recklessness is a state of consciousness with reference to the consequences of one's acts. . . . It requires a conscious choice of a course of action either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man, and the actor must recognize that his conduct involves a risk substantially greater . . . than that which is necessary to make his conduct negligent. . . . It is more than negligence, more than gross negligence." (Citations omitted; internal quotation marks omitted.) *Sheiman* v. *Lafayette Bank & Trust Co.*, 4 Conn. App. 39, 45–46, 492 A.2d 219 (1985).

In *Doe* v. *Wesleyan University*, United States District Court, Docket No. 3:19-CV-01519 (JBA) (D. Conn. February 19, 2021), the plaintiff claimed that Wesleyan repeatedly and

intentionally violated its own policies and procedures in an academic misconduct adjudication. The court held that such allegations "could plausibly rise to the level of wanton and reckless misconduct." Id. "In alleging that Wesleyan knew or should have known that its actions violated internal policies, Plaintiff's claimed conduct is markedly different from inadvertence, inexperience, or negligence. Plaintiff points to Wesleyan's repeated breaches of its contract with her by failing to substantively comply with its policies set forth in the Handbook which could plausibly be found to be highly unreasonable such that the conduct was reckless and wanton." Id.

Here, prior to expelling the plaintiff, the defendant was aware that the plaintiff claimed that Coach Gritti had used profanity when referring to students and had called the plaintiff "stupid." See Pl. Obj. Exs. S, X, AW, AV. A trier of fact could find that expelling the plaintiff based, at least in part, on the plaintiff's derogatory rant at a staff member when the staff member himself referred to students in a derogatory fashion, "could plausibly rise to the level of wanton and reckless misconduct." *Doe* v. *Wesleyan University*, supra, United States District Court, Docket No. 3:19-CV-01519 (JBA).

Further, there are also issues of material fact in dispute concerning whether the defendant acted wantonly or recklessly in allegedly covering up Coach Gritti's treatment of the plaintiff in its executive summary to the headmaster. Specifically, despite various accounts of Coach Gritti using profanity with the plaintiff and calling him stupid, the executive summary merely states that "Coach Gritti did use inappropriate language in front of student, but according to the people who we interviewed that language was not directed at individuals, but typically at situations." Pl. Obj. Exs. AW, AV.

Accordingly, since there are genuine issues of material fact in dispute, summary judgment as to the plaintiff's seventh count is denied.

IV

CONCLUSION

For all of the foregoing reasons, the defendant's motion for summary judgment is denied as to all counts.

BY _____
Lynch, J.